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HUNTINGTON, NY 11743-0777

EXAMINER
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ZIMMERMAN, JOSHUA D

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PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* ROBERT D. KROSS<sup>1</sup>

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Appeal 2016-008692<sup>2</sup>  
Application 14/565,190  
Technology Center 2800

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Before MARK NAGUMO, N. WHITNEY WILSON, and  
BRIAN D. RANGE, *Administrative Patent Judges*.

NAGUMO, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Robert D. Kross (“Kross”) timely requests rehearing<sup>3</sup> under 37 C.F.R. § 41.52 (“Rule 52”) of our Decision, issued 22 December 2016, in which we affirmed the rejections of all pending claims 1–8 as obvious under

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<sup>1</sup> The real party in interest is identified as Poly-Gel LLC. (Appeal Brief, filed 1 April 2016 (“Br.”), 1.)

<sup>2</sup> This appeal is related to Appeal 2016-008698 in parent application 13/275,400 (filed 18 October 2011), which was decided concurrently. A Request for Rehearing was filed simultaneously in that case, raising substantially similar issues, and is decided concurrently.

<sup>3</sup> Request for Rehearing filed 9 January 2017 (“Request”).

35 U.S.C. § 103(a)<sup>4</sup> over the combined teachings of Germain, Singular Impressions, and Chen '669<sup>5</sup> (full cites in the original Opinion)<sup>6</sup>.

Rule 52 states in most relevant part, “[t]he request for rehearing must state with particularity the points believed to have been misapprehended or over-looked by the Board.” 37 C.F.R. § 41.52(a)(1) (2016).

We have considered the Request, and we clarify our Opinion in minor respects, but we deny the requested relief.

The arguments of record are sufficiently succinct that we may review them to put Kross’s arguments in its Request into context without unduly burdening the reader.

On appeal, Kross urged first that Germain is limited to making a gelatin printing plate, and in particular, that Germain does not teach or suggest a non-gelatin printing plate. (Br. 11, ll. 1–9.) Kross argued further that Simple Impressions teaches a printing plate for monotype printing, but does not teach or suggest using any type of “gel” printing plate (*id.* at ll. 10–14), and moreover, “does not disclose a printing plate for producing a monotype printing plate that is necessarily limited to solely the pressure of one’s hand” (*id.* at ll. 16–18). Kross then urged that Chen '669 “has no

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<sup>4</sup> Because the application was filed before 16 March 2013, we refer to the pre-America-Invents-Act version of Title 35 U.S.C.

<sup>5</sup> John Y. Chen, *Tear resistant gels and articles for every uses*, U.S. Patent Application Publication 2005/0008669 A1 (2005) was mis-cited in the original Opinion as 2005/000869 A1; and all references to “Chen '869” should read “Chen '669”.

<sup>6</sup> A rejection in view of an additional reference, Zirker, was not argued separately.

relevance to any type of printing apparatus or method.” (*Id.* at 12, ll. 3–4.) Instead, Kross argued, Chen ’669 teaches “gelatinous elastomer compositions and articles with a disclosed use as ‘fishing bait’ (and perhaps, other unspecified uses) and, as such, should not be considered pertinent for application in an obviousness rejection of Appellant’s claims.” (*Id.* at ll. 5–7.) Nor, Kross continued, should Chen ’669 be considered in combination with Germain or Singular Impressions. (*Id.* at ll. 7–10.) In Kross’s view, the only source of teachings for the combination of a non-gelatin printing plate with monotype printing apparatuses or techniques is the ’190 Specification. (*Id.* at ll. 11–16.) Kross reiterated these arguments in the Reply, emphasizing that Germain merely sought to “cope with the gelatin cracking and splitting” and did not teach or suggest looking for any other materials. (Reply 3, ll. 9–11.)

On Request for Reconsideration, Kross argues that we mischaracterized and misapplied the law of obviousness in citing *Hotchkiss* (prima facie obvious to use known materials disclosed as having suitable properties) because we overlooked or misapprehended the new functions and properties afforded by the use of non-gelatin viscoelastic polymers in place of the gelatin sheet printing material taught by Germain. (Request 3, ll. 4–10.) Rather than seeking a new material, Kross urges, Germain was content to cope with the cracking of the gelatin plate and the difficulties attendant to clean-up. (*Id.* at ll. 15–18.) Kross further criticizes our determination that the level of skill in the art was sufficiently high that the routineer would have recognized the suitability of the viscoelastic gels taught by Chen ’669 as substitutes for the gelatin taught by Germain. (*Id.* at 6–7.) Kross emphasizes the absence of any teaching or suggestion in the prior art,

particularly Chen '669, that the viscoelastic gels were “known to have been used in any type of printing technology, let alon[e] the monotype printing of the nature to which Appellant’s claimed invention is directed.” (*Id.* at 6, ll. 21–23.) Kross then reiterates the argument that only hindsight motivates the appealed rejection (*id.* at 7–8).

We are not persuaded of harmful error in the appealed rejection or in our affirmance of that rejection.

The recognition by Germain of mechanical problems with gelatin in printing (splitting, cracking) would have prompted a person having ordinary skill in the art to consider materials having similar properties, but less prone to splitting. As the Examiner found, and as Kross does not dispute, Chen '669 discloses “an improved viscoelastic gel composition which results in articles that do not crack, creep, tear or rupture from normal use and have elastic memory enabling the articles to recover and retain its original molded shape after many extreme deformation cycles.” (FR 3, ll. 8–11, citing Chen '669 paragraph [0181].) Thus, a preponderance of the evidence supports the Examiner’s underlying findings concerning why a person of skill in the art would have considered Chen '669 in order to address cracking of non-gelatin plates because of its advantages (Ans. 3–4, citing Chen '669 ¶¶ [0007], [0038], [0039], and [0182]), and a preponderance of the evidence supports the Examiner’s obviousness conclusion. The silence of Chen '669 as to a particular application is of little or no moment given the teachings of the properties and the resulting general uses of the viscoelastic gel-like materials, which would have suggested those materials as, more likely than not, a successful solution to the problems of

gelatin cracking and splitting and clean-up issues encountered by the prior art, such as Germain.

We are well aware that seemingly simple and “obvious” inventions have been overlooked by entire industries (cases of long-felt but unfilled need often fall into this category); and that some “simple” inventions have unforeseen and thus unexpected advantages<sup>7</sup>. The present case is distinguished from these classes of cases by the absence of argument supported by credible evidence of record of the presence of long-felt need, unexpected results, or other so-called “secondary” indicia of non-obviousness. In these regards, there are no working examples in the Specification, and Kross has not directed our attention to experimental evidence of record comparing the claimed invention with the prior art.

The Supreme Court, in its most recent decision on obviousness, explained,

If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same

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<sup>7</sup> Kross appears to place the Teflon<sup>®</sup>-coated electrodes at issue in *Leesona Corp. v. United States*, 530 F.2d 896 (Ct. Claims 1976), in this category. (Request 4–5.) But the facts of that case render it inapposite to the present case. In *Leesona*, the court found that the differences between the claimed electrode and the prior art resided “both in the use of a fluorocarbon as the binder material *and* in mixing particles of the fluorocarbon with particles of the catalyst instead of coating the catalytic particles with a solution of the plastic binder material as is the case with [the other prior art references].” 530 F.2d at 902; emphasis added. Thus, the invention in *Leesona* did not involve a simple substitution of one material for another. Moreover, as indicated in the passage cited by Kross indicates, it was not known why the claimed combination worked, and “even now, only theories have been developed to explain its superior performance.” *Id.* at 903.

reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. . . . a court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions likely to be obvious when it does no more than yield predictable results.

*KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 416 (2007). We, following the Examiner, have done no more—and no less—than apply these principles to the evidence advanced by the Examiner and by Kross.

Kross has not shown error in the findings of fact or in the application of the law of obviousness to this case.

C. Order

It is ORDERED that the Request for Reconsideration is granted.

It is FURTHER ORDERED that the Request for Relief is denied.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

DENIED